respondent was aware of the appeal even without being served with the notice of appeal;

(f) O 49 r 2(6) of the SCR does not prescribe a time limit for the service of the notice of appeal and so it can only be interpreted as meaning that it should be served within a reasonable time;

(g) the case authorities that had decided on this issue are where the facts indicate that the respondent was totally unaware of the appeal in the first place until at a late stage whereas here the respondent had been informed of the appeal about a month after the decision by the Ipoh High Court and she had not raised any objections to the non-service even at the second application for the stay of the execution in the High Court on 29 June 1984 when the copy of the notice was exhibited to the notice of motion;

(h) in any case, the non-service of the notice of appeal was an irregularity under O 2 r 1(1) of the Rules of the High Court 1980 (hereinafter 'the RHC') and the court had the unfettered discretion under O 3 r 5 of the RHC to extend the time.

The respondent had, after my decision, changed solicitors to apply for leave to appeal as the subject matter was less than $100,000 and because there were several questions of law, namely:

(a) whether an application for extension of time should be before the magistrate or the appeal court;

(b) whether the application should be by way of notice of motion and not by way of summons-in-chambers;

(c) whether enclosing a notice of appeal by way of exhibit amounts in law to service of the notice on the respondent;

(d) whether the long lapse of time from 25 January 1984 to 20 June 1984 is a reasonable period; and

(e) whether the solicitor's mistake can be a good ground.

As regards point (a), since no time limit is stated for service of the notice of appeal, the question does not arise for the magistrate and my view is that it is within the power of the High Court to extend the time, if applied for or otherwise, under O 3 r 5 of the RHC. Point (b) is purely procedural but my opinion is that, in view of the nature of the application, if brought in the High Court, it had correctly been made vide a summons-in-chambers and not by notice of motion in the light of O 5 r 3 of the RHC. Even if this opinion is in error, any wrong procedure taken is a curable irregularity. As for points (c), (d) and (e), my decision had implied that the service of the photocopy of the notice of appeal vide the application for stay on 29 June 1984 was sufficient notice on the respondent and that a four-month delay and the new solicitor's oversight were excusable in the circumstances. Despite these, I felt that this was a good case to get a ruling from the Supreme Court and granted the respondent leave to appeal without making any order as to costs.

Application allowed.

Solicitors: *Bachan & Kartar; Kean Chye & Sivalingam.*

Reported by *Mathavan Devadas*

Public Prosecutor v Ng Lai Huat & Ors

HIGH COURT (KUALA LUMPUR) — FEDERAL TERRITORY CRIMINAL TRIAL NO CR 56-1-87
FAIZA TAMBY CHIK JC
16 MARCH 1990

Evidence — Hearsay — Applicability of the rule against hearsay evidence — Evidence Act 1950, s 10

Criminal Law — Kidnapping — Ransom — Kidnapping Act 1961, s 3

The five accused were charged with kidnapping and the sole question that fell to be decided by the court was whether they detained the victims with the intention of holding them to ransom. The principal prosecution's evidence was the testimony of the former Director of Prisons that he spoke to one of the accused, Jimmy Chua, who demanded, inter alia, that the accused persons be freed and given a getaway car.

Held, convicting the accused on amended charges:

(1) The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made.

(2) In the present case, the purpose of introducing the utterances of Jimmy Chua was to show that a ransom was demanded by the accused persons. These utterances were hearsay and inadmissible as their purpose was to establish the truth of those utterances.

(3) That being the case, the remainder of the prosecution's evidence was insufficient to sustain the charges of kidnapping as the essential ingredient of a ransom having been demanded was absent. However, the court being satisfied that the accused persons were involved in the abduction and wrongful confinement of the victims, amended the charges accordingly.

Cases referred to

1 *Subramaniam* v *PP* [1956] MLJ 220 (folld)
2 *Teper* v *R* [1952] 2 All ER 447 (refd)
3 *Myers* v *DPP* [1964] 2 All ER 881 (folld)
4 *Ratten* v *R* [1972] AC 378 (folld)

Legislation referred to
Evidence Act 1950 s 10
Kidnapping Act 1961 s 3

Jalaluddin bin Saleh (Deputy Public Prosecutor) for the Public Prosecutor.
Lee Swee Seng for the first and fourth accused.
Muhammad Shafee Abdullah and *P Vallen* for the second accused.
Karpal Singh for the third and fifth accused.

Cur Adv Vult

Faiza Tamby Chik JC: All the five accused persons are charged with the following two charges:

First charge
That you, with Chua Chap Seng @ Jimmy Chua, between 9.15am on 17 October 1986 and 5.40pm on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Dr Radzi bin Jaafar NRIC No 0116886 and you have thereby committed an offence punishable under s 3(1) of the Kidnapping Act (No 41 of 1961) read with s 34 of the Penal Code (FMS Cap 45).

Second charge
That you, with Chua Chap Seng @ Jimmy Chua, between 9.15am on 17 October 1986 and 5.40pm on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the city of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Abdul Aziz bin Abdul Majid NRIC No 4002881 and you have thereby committed an offence punishable under s 3(1) of the Kidnapping Act (No 41 of 1961) read with s 34 of the Penal Code (FMS Cap 45).

In this case, there is no dispute that the victims, Dr Radzi and Encik Aziz, were wrongfully confined at the hospital building in Pudu Prison, Kuala Lumpur by the five persons mentioned above between the dates and times referred to in the two charges. The sole question for the determination of this court is whether it has been proved that they did so with the intention of holding them for ransom.

The foundation of the prosecution's case is based mainly on the oral testimony of Datuk Ibrahim bin Hj Mohd (PW13), the former Director-General of Prison, and his evidence as far as it is relevant in respect of 'ransom' may be summarized as follows:

(i) On 17 October 1986, he was informed by his office at the Prison Headquarters in Taiping that two persons, one Dr Radzi and the other Encik Aziz, were held as hostages by six remand prisoners of Pudu Prison in the prison hospital in Pudu Prison, Kuala Lumpur.

(ii) On 18 October 1986, he went to Pudu Prison, Kuala Lumpur and at the prison hospital he was introduced to Jimmy Chua, one of the six remand prisoners, by the Deputy Superintendent. He met Jimmy Chua alone. He said that Jimmy Chua demanded:

(a) to be freed from prison;
(b) to be provided with a getaway car so that he could take Dr Radzi and Encik Aziz together with the five accused persons and get out of Pudu Prison completely;
(c) that the government withdrew all the charges against him and the five accused persons.

(iii) He also said that Jimmy Chua was making the above demands on behalf of himself as well as on behalf of the five accused persons as they could not understand Malay or English very much.

(iv) He said that he met Jimmy Chua every day in the morning and in the evening until night-time, except when Jimmy Chua was having his nap, from 18 October 1986 until Dr Radzi and Encik Aziz were rescued on 22 October 1986. He further said that on those days starting on 18 October 1986 until 22 October 1986 Jimmy Chua repeatedly made the said demands.

(v) He said that after Jimmy Chua introduced each of the five accused persons to him on 18 October 1986 he did not come close to anyone of the five accused persons anymore except that the five accused persons wished him 'selamat pagi' and then went inside.

Now, the learned DPP Encik Jalaluddin Saleh urged the court to accept that the said demands conveyed through Datuk Ibrahim by Jimmy Chua were made by all the five accused persons through their spokesman Jimmy Chua; and this, the learned DPP contended constituted ransom as spelt out in the Kidnapping Act 1961.

Now, at this juncture, it may be quite apposite for me to relate this. Now, PW13 began giving his evidence on oath on the fifth day of the trial on 9 March 1990. While he was relating his conversation with Jimmy Chua in respect of the demands made by the latter, learned defence counsel, Encik Karpal Singh, counsel for the third accused and the fifth accused, got up and asked, 'Is Jimmy Chua alive now?' PW13 answered, 'He has been hanged.' Thereupon, Encik Karpal Singh took objection to the demands made by Jimmy Chua on PW13 as this piece of evidence, he urged, was hearsay within the general principles expounded by the Privy Council in the case of *Subramaniam* v *PP*.[1] Encik Karpal Singh further stated that if the purpose of adducing the utterances by Jimmy Chua to Datuk Ibrahim was to establish the truth of what was uttered, he would object. Encik Shafee Abdullah, counsel for the second accused, and Mr Lee Swee Seng, counsel for the first accused and the fourth accused, raised the same objection. In the circumstances, I adjourned the case for 30 minutes to allow defence counsel to make preparation for a short submission on this point. When the

court met again at 10.30am, I heard brief submissions made by learned defence counsel Encik Karpal Singh, Encik Shafee Abdullah and the learned DPP Encik Jalaluddin Saleh, at the end of which, after due consideration of the brief submissions made, I ruled that the utterances in respect of the demands made were admissible as I was of the opinion at that time, that the facts contained in the utterances in respect of the demands made by Jimmy Chua to PW13 in the light of the evidence adduced by the prosecution had been shown to be logically relevant under s 10 of the Evidence Act 1950.

The prosecution closed its case on the seventh day of the trial on 14 March 1990. And learned defence counsel made their submissions on the eighth day of the trial on 15 March 1990. In gist, the submissions of counsel revolved round the meaning of the word 'ransom' as obtainable in the Kidnapping Act 1961, the utterances in respect of the demands made by Jimmy Chua to PW13 as being hearsay evidence, the definition of s 34 of the Penal Code (FMS Cap 45) being an evidential section and s 10 of the Evidence Act 1950 which deals with the substantive offence of conspiracy and s 114(g) of the Evidence Act 1950 about the drawing of adverse inference. As will soon become apparent, it will not be necessary for me to touch on the meaning of the word 'ransom' as defined in the Kidnapping Act 1961 and also s 114(g) of the Evidence Act 1950, nor will it be necessary for me to touch on s 34 of the Penal Code (FMS Cap 45) and s 10 of the Evidence Act 1950. Therefore, I shall concentrate the rest of my judgment on what hearsay evidence is.

The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has long been established as a fundamental principle of the law of evidence.

What is hearsay evidence? Evidence by a witness of what another person has stated (whether verbally, in writing or otherwise) on a prior occasion is inadmissible for the purpose of proving that any fact stated by that person on such prior occasion is true. The hearsay rule will be infringed where reliance is placed on the evidence of someone not before the court where the evidence is adduced in order to prove that the facts as stated are true.

And in *Teper* v *R*,[2] Lord Normand said:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

In my opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule, certain exceptions have been recognized upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in s 32 of the Evidence Act 1950. Since neither learned counsel for the accused persons nor the learned DPP seemed to rely on any of these statutory provisions, no more need be said about them in this judgment.

The rule against hearsay is described in *Cross on Evidence* (6th Ed, 1985) at p 453 as one of the oldest, most complex and most confusing of the exclusion rules of evidence. In *Myers* v *DPP*[3] at p 884, Lord Reid said:

> It is difficult to make any general statement about the law of hearsay evidence which is entirely accurate... It does seem however that in many cases there was no justification either in principle or logic for carrying the exception just so far and no further. One might hazard to surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind of judicial legislation, however, became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped. The natural result has been the growth of more and more fine distinctions, so that it now takes even so concise an author as Professor Cross over 100 closely packed pages to explain the law of hearsay evidence.

The hearsay rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made. The relevance of such evidence, called original evidence, is revealed by the leading case of *Subramaniam* v *PP*.[1] In this case, the accused was charged with unlawful possession of ammunition. His defence was that he had been captured by terrorists and was acting under duress. The trial judge held that the evidence of his conversation with the terrorists was inadmissible unless the terrorists testified. The Privy Council allowed his appeal. The hearsay rule was not infringed because his evidence about what the terrorists had said to him was not adduced in order to show that what the terrorists had said was true but in order to show that threats had in fact been made. The statement of the terrorists comprised threats against Subramaniam's family and the important thing was that Subramaniam believed the terrorists although it may of course have been that the terrorists were not telling the truth when they said they would terrorise Subramaniam's family.

Here, in *Subramaniam*'s case,[1] he wanted to prove the words that had been spoken to him in order to establish his reaction to them which would entitle him to the defence of duress. The further questions whether the words are true did not arise; what was in issue was that the words were threats of such a nature as to constitute duress and he believed them. For this purpose, he must be entitled to rely on the terms of the threat as original evidence.

In *Ratten* v *R*[4] at p 387, Lord Wilberforce said:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no

objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', ie as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam* v *PP* [1956] 1 WLR 955 at p 970:

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'

Now, what was the purpose of introducing these utterances in respect of the demands allegedly made by Jimmy Chua to PW13? The learned DPP said that the purpose was to show that ransom was made not only by Jimmy Chua himself but also by the five accused persons. Here, the oral hearsay was that of the retelling by PW13 of utterances in respect of the demands made by Jimmy Chua. Now, this may or may not be hearsay. It is hearsay and therefore inadmissible if the purpose of the utterances in respect of the demands made by Jimmy Chua was to establish the truth of those utterances in respect of the demands made. It is not hearsay and therefore is admissible when the purpose was to establish by the utterances in respect of the demands made by Jimmy Chua not the truth of what Jimmy Chua uttered but the fact that Jimmy Chua did utter something to PW13.

I have dealt here at length with the basic principle of hearsay evidence because I am of the view that the demands made by Jimmy Chua to PW13 formed the superstructure of the prosecution's case. I was wrong to admit the evidence of PW13 in relation to Jimmy Chua's purported demands in the early part of the prosecution stage. I therefore reverse my earlier ruling on this point and rule that those purported demands are inadmissible for being hearsay.

Now, after discarding the evidence of PW13 in relation to Jimmy Chua's purported demands, the remaining oral evidence adduced at this trial was insufficient to sustain the two charges against the five accused persons under s 3(1) of the Kidnapping Act 1961. 'Ransom', which is one of the essential ingredients of the offence under s 3(1) of the Kidnapping Act 1961, is absent here.

I am not satisfied that the prosecution had proved its case beyond reasonable doubt that the five accused persons had committed an offence under s 3(1) of the Kidnapping Act 1961. I am, however, satisfied that on the prosecution's evidence all the five accused persons were involved in the abduction and wrongful confinement of one Dr Radzi and one Encik Aziz Majid. They had therefore committed an offence under s 365 of the Penal Code (FMS Cap 45). I proceeded to amend the two charges to s 365 of the Penal Code (FMS Cap 45) against the five accused persons as follows:

First amended charge
That you, jointly between 9.15am on 17 October 1986 and 5.40pm on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the City of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, did abduct one Dr Radzi bin Jaafar NRIC No 0116886 with intent to cause that person to be wrongfully confined and that you have thereby committed an offence punishable under s 365 of the Penal Code (FMS Cap 45) read together with s 34 of the Penal Code (FMS Cap 45).

Second amended charge
That you, jointly between 9.15am on 17 October 1986 and 5.40pm on 22 October 1986 at hospital building in Pudu Prison, Jalan Hang Tuah, in the City of Kuala Lumpur, in the Federal Territory, in furtherance of the common intention of you all, did abduct one Abdul Aziz bin Abdul Majid NRIC No 4002881 with intent to cause that person to be wrongfully confined and that you have thereby committed an offence punishable under s 365 of the Penal Code (FMS Cap 45) read together with s 34 of the Penal Code (FMS Cap 45).

The two amended charges were read to each of the accused persons. Each of the accused persons unequivocally pleaded guilty to the two amended charges in the presence and hearing of their counsel, and understood the nature and consequences of their pleas.

After hearing mitigating factors submitted by all the five accused persons through their counsel, I sentenced the first accused, the second accused and the third accused on each of the charges to five years' imprisonment from the date of arrest to run concurrently. I sentenced the fourth accused and the fifth accused on each of the charges to three years' imprisonment from the date of arrest to run concurrently.

Order accordingly.

Solicitors: *Ch'ng Lee & Co; Shafee & Co; Karpal Singh & Co.*

Reported by *Mathavan Devadas*